Consolidation Coal Company *and* United Mine Workers of America, District 31. Case 6–CA–23393

June 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 17, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by denying the Union access to its property for purposes of securing samples of residue. In so doing, we note that, contrary to the judge, the Respondent has admitted that coal, among other substances, is contained within the sediment. However, we further note that the Respondent does not agree with the Union that the residue which accumulates in the sediment ponds is ''coal waste'' within the meaning of the work jurisdiction clause, art. 1A, sec. (a), of the existing agreement. In short, it is not controlling for the purposes of this case whether the Union or the Respondent has the correct view of the meaning of the contractual term ''coal waste.'' The Union's view is at least arguable, and the Union is entitled to access to secure evidence of what is actually there, in support of its view. The arbitrator will be the judge of the persuasiveness of the evidence. Further, we note that the Respondent contends that the record in this proceeding does not establish, as the judge intimated, that for purposes of an arbitration proceeding a scientific lab result of the pond sediment is necessarily the ''best evidence'' to prove the existence of ''coal waste.'' However, we find it unnecessary to pass on whether the pond sediment is the most probative evidence to support the Union's contractual argument before an arbitrator.

Finally, in adopting the judge's conclusion, we note that art. 1A, sec. (e) of the same agreement provides, in relevant part:

> Authorized representatives of the Union shall be permitted reasonable access to the mine property to insure compliance with this Agreement.

[2] In par. 1(b) of his recommended Order, the judge used the broad cease-and-desist language ''in any other manner.'' However, we have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), and have concluded that at this time the narrow cease-and-desist language ''in any like or related manner'' is appropriate. We shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consolidation Coal Company, Robinson Run Mine No. 95, Shinnston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive bargaining agent of our employees in the appropriate unit by failing and refusing to furnish the Union access to our property to secure residue from sediment ponds which residue is necessary for and relevant to the Union's discharge of its collective-bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL permit the Union, on request, access to our property to secure samples of residue from our ponds.

CONSOLIDATION COAL COMPANY

Patricia J. Scott, Esq., for the General Counsel.
Daniel L. Fassio, Esq., of Pittsburgh, Pennsylvania, and *Robert M. Steptoe, Jr., Esq.* and *David M. Hammer, Esq.*, of Clarksburg, West Virginia, for the Respondent.
Carlo Tarley, Executive Board Member, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On February 20, 1991, the United Mine Workers of America, District 1 (the Union) filed a charge against Consolidation Coal Company (the Respondent).

On March 1991, the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint which was later amended, which alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relation Act

when it failed and refused to provide information to the Union in the form of samples of residue dredged from a pond which information the Union claims was necessary for and relevant to the performance of its function as the exclusive bargaining representative of certain employees of Respondent.

Respondent filed an answer in which it denies it violated the Act in any way.

A hearing was held before me in Fairmont, West Virginia, on September 19, 1991.[1]

I find that Respondent did violate the Act as alleged in the complaint.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business at the Robinson Run Mine #95 rear Shinnston, West Virginia, has been engaged in the mining and nonretail sale of coal.

During the 12-month period ending January 1, 1991, Respondent, in the course and conduct of its business operations, sold and shipped from its Shinnston, West Virginia facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of West Virginia.

Respondent admits, and I find, that it is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that the United Mine Workers of America, AFL–CIO (International Union), and its District 31, and United Mine Workers of America, Local 501 (collectively the Union), are now, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The International Union has been the designated exclusive collective-bargaining representative of Respondent's employees as described in the National Bituminous Coal Wage Agreement of 1988. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period February 1, 1988, to February 1, 1993.

Pursuant to the Federal Surface Mining Control and Reclamation Act, Respondent in the seventies constructed several man-made ponds on its property. The ponds were for the purpose of collecting water runoff so the runoff of surface water over surfaces disturbed because of mining did not contaminate nearby streams.

Periodically, the ponds must be dredged of sediment which has settled on the bottom of the ponds. Under Federal law, dredging must take place once a pond has accumulated sediment to 60 percent of its capacity. For years Respondent has employed an outside contractor to once or twice a year dredge the four ponds on its property. The outside contractor uses a hydraulic dredge called a mudcat and other equipment to do the dredging. Respondent does not have its own mudcat.

In the spring of 1990, an outside contractor was hired to dredge one of the ponds on Respondent's property. The Union believed that the product being dredged was coal waste. If it was coal waste then the removal of the coal waste through the dredging process was unit work and could not be contracted out under the contract. The Union referred to its collective-bargaining agreement for its authority that if the product being dredged is coal waste it is unit work.

Article IA, section (a) of the collective-bargaining agreement entitled ''Work Jurisdiction'' provides in pertinent part as follows:

> The production of coal, including *removal* of overburden and *coal* waste, preparation, processing and cleaning of coal and transportation of coal . . . and work of the type customarily related to all of the above *shall* be performed by classified Employees of the Employer covered by and in accordance with the terms of this Agreement. [Emphasis added.]

Respondent takes the position that the residue is just sediment and not coal waste and Respondent is, therefore, permitted to contract out the dredging work.

The Union filed a grievance and wanted a sample of the residue in the pond so that it could send it to a laboratory for ana]ysis to determine whether the residue was coal waste or not. Respondent said okay. Representatives of Respondent and the Union then went to the pond and took samples of residue from four parts of the pond—two selected by Respondent and two by the Union. The Union filled four 1-pint jars with residue. The jars were provided by the lab. The entire process of collecting the residue took between 5 to 15 minutes. The cost of the lab work was borne entirely by the Union. It cost Respondent no more thau 15 minutes of one employee's time.

The Union sent the jars to Reliance Laboratory which apparently performed the wrong test. The Union, without scientific evidence that the residue was coal waste, withdrew the grievance. By this time, of course, the pond had been dredged and there was no residue to collect. Carlo Tarley from District 31 told Local 1501 Vice President Carl Morris to get a sample of residue the next time Respondent brought in an outside contractor to dredge one of the ponds.

In December 1990 Morris saw an outside contractor dredging one of the other ponds at Robinson Run Mine #95. On December 10, 1990, Morris asked Plant Superintendent John Boyd for a sample of residue from the pond and Boyd said he did not have authority to give him a sample. The next day Morris asked Employee Relations Supervisor Mark Shiffbauer for a sample. Shiffbauer said he had to check on it but never got back to Morris. A grievance was filed on December 11, 1990. In the grievance the Union objected to an outside contractor doing unit work. At a step 2 grievance

[1] On this same day a hearing was held before me involving the same Respondent and Charging Party, i.e., *Consolidation Coal Co.*, Case 6–CA–2681. No party to the litigation moved to consolidate the two cases.

meeting on January 9, 1991, the Union asked Superintendent Denver Johnson for a sample of residue from the pond. Johnson said that the dredging was complete, the residue buried, and he had no residue from the pond to give the Union and, in any event, it was Respondent's property and Respondent should not give a sample to the Union.

A union is entitled to information which is necessary for and relevant to the discharge of its responsibilities as exclusive collective-bargaining representative and a failure by an employer to furnish such information is an unfair labor practice. See *NLRB v. Acme Industrial Co.*, 385 NLRB 432 (1967). One of the obligations of the Union is to process grievances. It would appear to me that it goes without saying that in light of the contract provision granting exclusive jurisdiction to the unit for removal of coal waste that the Union should be allowed onto the property of Respondent to secure a sample of residue from the pond to send to a lab for analysis to see if what is being dredged is coal waste or not. As noted above, the cost of the analysis will be borne by the Union. The amount of time it takes to collect the sample is no more than 15 minutes and a representative of Respondent can and should be present at the time the sample is acquired. Balancing the property rights of Respondent against the need of the Union for the sample to process the grievance and considering the slight intrusion on Respondent's property, it is obvious that Respondent's property rights should yield to the Union's right to collect the residue sample. See *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985).

Respondent concedes in its brief but did not at the hearing or in the pleadings that some coal may be in the residue, which residue by the way has no mometary value to Respondent. This does not resolve the issue however. It is obvious that a scientific lab result will be the best evidence one way or the other in any arbitration. The grievance is on hold pending disposition of this case.

Respondent relies on two prior arbitration decisions. The first decision issued on March 27, 1986, and involved one of Respondent's other mines, i.e., Loveridge Mine #3. An issue in that arbitration was whether the residue dredged from the ponds at Loveridge Mine #22 was coal waste or not. The arbitrator concluded it was not coal waste but noted in his decision that no samples of residue were taken by either party to the arbitration to try and determine the amount of coal waste that may have accumulated in the pond during a specific period of time. It seems clear that scientific evidence would be helpful to the arbitrator in deciding whether dredging of the ponds is removal of coal waste and unit work under the contract or not.

The other arbitration decision issued on June 30, 1988, and involved Respondent's Osage Mine #3. In that case the arbitrator ruled that the dredging of the ponds is not exclusive unit work and that the residue is not coal waste. However, he did not have scientific evidence as to the makeup of the residue.

It seems obvious that the Respondent should permit the Union limited access to its property to remove samples of residue from the next pond which is ready to be dredged. The obtaining of the residue should he done in the same manner as it was done in the spring of 1990, i.e., with minimal inconvenience and virtually no expense to Respondent. Respondent's failure to do so violated Section 8(a)(1) and (5) of the Act.

The General Counsel requests a broad remedial order in this case. The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease-and-desist order requiring a respondent to cease and desist from ''in any other manner restraining or coercing employees in the exercise of their Section 7 rights'' rather than the narrow ''in this or any like manner'' language should be reserved for situations where a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

The General Counsel has referred me to enough cases of unfair labor practices being committed by this Respondent that I will grant the application for a broad remedial order.[2] I do even though the evidence at the hearing reflects that Respondent is the second largest producer of coal in the United States, operates some 25 unionized mines in 7 States, and employs some 10,500 people.

CONCLUSONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1501, District 31, and the International Union, United Mine Workers of America are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it refused access to the Union to enter its property for purposes of securing samples of residue which was necessary for and relevant to the Union's performance of its collective-bargaining responsibilities.

THE REMEDY

Having found that Respondent has engaged in this unfair labor practice, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Consolidation Coal Company, Shinnston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing the Union access to its property to secure a sample of residue which residue is necesssary for and relevant to the Union's discharge of its collective-bargaining responsibilities.

---

[2] See the following Board cases where Respondent was found to have violated the Act: 253 NLRB 789 (1980); 256 NLRB 541 (1981); 260 NLRB 466 (1982); 263 NLRB 1306 (1982); and 266 NLRB 670 (1983).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any other manner interfering with, restraining, or coercing thelr employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Grant access to the Union to its property to secure a sample of residue from sediment ponds when requested by the Union.

(b) Post at its Shinnston, West Virginia facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''